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IN THE CIRCUIT COURT OF AUGUSTA COUNTY.

ROWE'S COMMITTEE *v.* WESTERN STATE HOSPITAL.

July, 1911.

1. Constitutional Law—Trusts and Trustees—Power of Legislature to Divert Trust Funds to Public Uses Other than Those for Which They Were Given.—Where a devise has been made to and accepted by the board of one of the public institutions of the state, such as the Board of the Western State Hospital, the object for which it was given being expressly stated in the will, the board is bound to so administer it, and the Legislature cannot authorize it to be applied to other purposes, however praiseworthy and important, and an act of the legislature such as that of Feb. 20, 1906, attempting to do so, is unconstitutional and of no effect.

2. Enforcement of Trust—Suit against State.—A bill will lie at the instance of a beneficiary under the trust to compel the board of the Institution to apply the funds as directed by the testator, and such a suit is not a suit against the state. The circuit court has jurisdiction of such suit, and the demurrer is overruled.

OPINION.

S. H. LETCHER, J.: Rowe, an inmate of the Western State Hospital, by his committee, A. S. Robertson, filed his bill, the purpose of which is to require the visitors of the Western State Hospital as trustees, under the will of S. R. Murkland, deceased, to administer the trust, and for other purposes; to this bill, a demurrer was filed on the part of the General Board of Directors of State Hospitals for the Insane, for want of jurisdiction. Under the will of Mr. Murkland, after providing for the payment of his debts and a few small legacies, he devised the residue of his estate, real and personal, to the trustees of the State Hospital, Staunton, Va. (where his son was being cared for as a patient) the increase from which was to be used by said trustees for the purchase of extra comforts for the patients in said hospital for all time. Considerable debt having been left chargeable on the estate, the Board of Visitors of the Hospital filed their bill in the City Court of Lynchburg exhibiting a copy of the will therewith; asked a convening of the creditors and a decree of sale of the property for their payment, and of the residue on their bequest, under the terms of the said will. The account of debts was taken and confirmed, when two parcels of the real estate in the city of Lynchburg were subjected under the decree of sale, which proving insufficient, the farm in Amherst County was then directed to be sold, when the Western Hospital became the purchaser, at the price of \$17,125, of which,

the sum of \$3,500 was required to pay off the remaining indebtedness, legacies and unpaid cost, leaving as the residue, the sum of \$13,525 as the property of the Western State Hospital, which balance the court directed to be credited on its deferred bonds for the purchase money and the deed to be made conveying to them the legal title to the farm. By an Act of the General Assembly approved Feb. 20, 1906, which recognized the ownership by the Western State Hospital in this farm, under the will of Mr. Murkland, yet required the Special Board of Directors of the Western Hospital under the supervision and control of the general board of directors of the state hospitals for the insane, to erect on this tract of land, all suitable buildings, etc., for the establishment of a colony for the reception, care, treatment, etc., of three hundred epileptic patients, and by an Act approved March 10, 1906, \$25,000 was appropriated by the Legislature for the purpose of building upon this property, and making provision for the maintenance of the colony, as contemplated by the act of February 20th. In the oral argument, the questions arising on the demurrer, were fully and elaborately presented. The first position taken by the Attorney General was that this was a suit against the State, and could not be maintained. This proceeding is against the Board of Visitors of the Western Hospital as the governing body of that institution, and not against the State, for the enforcement of the right of an insane person in their care and under their control, to enforce the trust, and carry out the provision of the Murkland bequest for their benefit; under the law applicable to State institutions, their Boards of Visitors as the governing body and as the representatives of the State in their management and control by provision of law, may sue and be sued as any other corporation without its being a suit by or against the state, so that this contention, that the suit cannot be maintained is, I think, without merit. Under the provision of the will, the residue of the estate is left to the hospital for a certain purpose, the principal to be held, while the increase of the devise is directed to be used and applied in a particular way, "for the comfort of the inmates, for all time" and the directors having elected to accept the devise for the purpose indicated, in my opinion are bound to so administer it; the position that this was a devise to the State, and that the legislature could direct its use and application, is not sustained by the facts or by precedent; for we know as a matter of common knowledge, that all the public institutions of this State have a governing body as the representatives of the State, appointed by the Governor with the consent of the Senate, who not only sue and are sued in the state courts, and to nearly all of whom, if not all of them have

been made donations and bequests amounting to many thousands of dollars, to be applied and used in particular ways, and the question of the right of these Boards to receive and use such donations under the terms of the gifts, has never been questioned. These boards are the natural trustees of these gifts, in whose hands they have been placed to be used and controlled by them in the manner directed, under the terms of the gifts, and many persons are the beneficiaries of these acts of generosity.

The son of Mr. Murkland, who was an inmate of the Western Hospital, was not an epileptic, but was one of that unfortunate class who had lost his reason and whose case was hopeless. This devise is not unlike many others made to our State institutions, and if the Legislature can appropriate and divert this donation from the purpose for which it was given, thereby nullifying the act of this testator in this special bequest, it can with equal propriety, take from the University and other institutions of the state, the large sums donated to them, and apply them in other directions, and for entirely different purposes from that for which they were given, simply and solely upon the ground that a donation to an institution as trustee, makes it the property of the State. The charity bestowed by Mr. Murkland to be dispensed through the agency of the governing body of the Hospital to the inmates, under their control and in their keeping, is clearly in my opinion a perfectly valid and legal devise, and the Board of Directors are competent trustees, to hold and administer this private charity, and trust, and be treated as an individual accepting such a trust, where it is germane to the purposes for which it was created by the State. Had the Hospital Board paid the entire purchase money of \$17,125.00 from its resources derived from the State it is altogether probable, that the State would have had the right to direct and appropriate the use of the farm, as the hospital had no means, other than appropriations made by the State, and the purchase price if paid from that source would have made it State property, but the State could certainly make no claim beyond the \$3,500 which the hospital paid in cash from the funds appropriated by the State, and was credited with the balance as a sum due it from the Murkland estate. The State can certainly make no claim for the residue or legally appropriate it by legislative act, for if it does not belong to the hospital, it belongs to the heirs of Murkland. Suppose some one else had been the purchaser, and paid the money into the hands of the receiver of the court, could it be contended that the State could successfully set up a claim to the residue of the fund after the satisfaction of the debts and legacies? I am unable to see upon what ground they could maintain such a demand; who could claim it rightfully, and

legally other than this hospital, for it is unquestionably a perfectly valid devise to the hospital as trustee, and yet the legislature has arbitrarily without authority or precedent, undertaken to divert the bequest to an object entirely foreign to the purpose of the testator, and one which he clearly never intended. It was not contended in the argument that the legislature was without the power to displace a corporation as trustee appointed to administer charitable trust and substitute in its place a board of trustees, even without the consent of the corporation. If the Hospital had declined the trust, or assented to any act of the legislature in creating a board of trustees to administer the trust in the place and stead of the hospital, such exercise of authority by the legislature would have been perfectly valid; and as stated in the opinion of the court in the celebrated Girard Case, 7th Wall. 14: "Nor can a valid vested estate in trust lapse or become forfeited by any misconduct in the trustee, or inability in the corporation to execute it, if such existed. Charity never fails; and it is the right, as well as the duty of the sovereign by its courts and public officers, as also by legislation (if needed) to have the charities properly administered."

I scarcely deem it necessary to discuss further the questions adverted to in the oral argument by Counsel.

I think the court has jurisdiction of the case; that the act of the legislature in undertaking to appropriate and divest the fund is ineffectual to destroy the trust, and that the plaintiff is entitled to the relief asked in accordance with the prayer of his bill. The demurrer must be overruled and the decree in accordance with these views entered.